STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB GROUP INSURANCE COMPANY, Plaintiff-Appellant, v DESHUNDREA WOOTEN, JASON TELFER EVANS, and RUTH ANN EVANS, Defendants-Appellees.	UNPUBLISHED April 27, 2010 No. 289159 Washtenaw Circuit Court LC No. 07-000591-CK

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying its motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendants Jason Evans (Evans) and his mother, Ruth Evans, co-owned and shared a house, insured by plaintiff. On February 1, 2006, Deshundrea Wooten was at the Evanses' house, helping Evans put up some cabinets. At that time, Ruth Evans was bedridden with multiple sclerosis. Evans had been convicted of a felony in the past and was not allowed to possess firearms. Nonetheless, he had bought a used handgun from a crack cocaine addict. Evans told Wooten that he had a gun. Wooten wanted to see it, so Evans retrieved it from the bedroom and showed it to Wooten. Wooten asked what was wrong with it, and Evans told him it was "a piece of shit." Evans checked to see if it was loaded. What happened next is described in various ways: "I switched the gun to my right hand and I went to check to see if one was in the chamber and the gun exploded in my hand"; "Evans stated that he pushed the button to release the ammunition clip and the, 'gun exploded in my hand and I dropped it on the floor'"; ". . . turn[ed] it to the side and hit the botton [sic: "button" or "bottom"] to take the clip out of the gun (I can't remember if I pull the hammer back to pull back the [chamber] to see if there was one in the [chamber]). It was like after I pull out the clip the gun exploded in my hand." The gun, however, had not actually exploded but had fired a round into Wooten's chest. There was no exit wound (the round was later removed from Wooten), and there was what appeared to be a bullet ricochet on the kitchen counter. Evans was charged with felon in possession of a firearm and resisting arrest. He pleaded guilty to the former in exchange for dismissal of the latter.

The governing homeowner's policy excluded coverage for certain bodily damages:

Under [liability insurance coverages], we will not cover:

* * *

5. bodily injury or property damage resulting from an act or omission by an insured person which is intended or could reasonably be expected to cause bodily injury or property damage. This exclusion applies even if the bodily injury or property damage is different from, or greater than, that which is expected or intended.

* * *

10. bodily injury or property damage resulting from:

a. a criminal act or omission committed by anyone; or

b. an act or omission, criminal in nature, committed by an insured person even if the insured person lacked the mental capacity to:

(1) appreciate the criminal nature or wrongfulness of the act or omission; or

(2) conform his or her conduct to the requirements of the law; or

(3) form the necessary intent under the law.

This exclusion will apply whether or not anyone, including the insured person:

(a) is charged with a crime;

(b) is convicted of a crime whether by a court, jury or plea of nolo contendere; or

(c) enters a plea of guilty whether or not accepted by the court[.]

Wooten filed a tort suit against the Evanses. Plaintiff had notified the Evanses that the homeowner's policy did not cover Wooten's injury claim, but after the tort suit was filed, plaintiff agreed to defend its insureds under a reservation of rights. But in June 2007, plaintiff filed this suit, seeking a declaratory judgment that it had no duty to further defend and no duty to indemnify in the underlying tort action.

The trial court disagreed, ruling that this was an "occurrence," triggering coverage under the policy. The court also ruled that the exclusion of ¶ 5 did not preclude coverage because the injury was not reasonably expected from Evans's actions where it was undisputed that he did not pull the trigger. Nor did the criminal act exclusion apply because the injury was "too tenuously connected to the possession of the firearm to say that the bodily injury suffered by Mr. Wooten resulted from the possession of the firearm." The charge of possession of a firearm was "not related to the discharge of a firearm."

Plaintiff moved for rehearing, arguing for the first time that the trial court should look at the conduct of Evans in terms of whether it fit any crime, not just the charged crimes. Plaintiff asserted that Evans's conduct violated either MCL 752.861, which provides, "Any person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . .", or MCL 752.863a which provides, "Any person who shall recklessly or heedlessly or wilfully or wantonly use, carry, handle or discharge any firearm without due caution and circumspection for the rights, safety or property of others shall be guilty of a misdemeanor." Plaintiff also argued that there was no valid claim against Ruth Evans because she did not even know her son had a gun and thus had no duty to Wooten regarding the injury. The trial court denied the motion, stating it was "not persuaded that a different ruling would result." The court entered a final order determining that the question of whether the policy provided coverage was a matter of law for the court to decide.

On appeal, plaintiff concedes that it is not contesting the trial court's conclusions that this was an "accident," triggering coverage under the policy, and that the injury was not reasonably expected, so that coverage is not precluded under ¶ 5 of the policy. Plaintiff relies entirely on the "criminal act" exclusion, and only as it applies because Evans's conduct violated at least one of the two firearm statutes, MCL 752.861 or 752.863a. Plaintiff does not argue that Evans's felon in possession crime triggers the exclusion.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the nonmoving party must come forward with evidentiary proof of specific facts showing a genuine issue for trial. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).[1] Issues of contract interpretation are questions of law, also reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

The applicability of MCL 752.861 or 752.863a was not plaintiff's theory in its motion for summary disposition, and it is therefore not properly preserved for appellate review. *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009). However, we may review an unpreserved issue if it is an issue of law for which all the relevant facts are available. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

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[1] Defendant Wooten has cited to several outdated cases, such as *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973) which no longer contain the proper standard to apply in deciding summary disposition motions under MCR 2.116(C)(10). See *McCart v J Walter Thompson USA Inc*, 437 Mich 109, 115 n 4; 469 NW2d 284 (1991); *Maiden*, 461 Mich at 120-121; *Smith v Globe Life Ins. Co.*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). Counsel is encouraged to be more careful in citing the appropriate standard in the future.

The policy language clearly requires that the injury must result from the criminal act. Plaintiff makes no attempt to refute the trial court's conclusion that there was no causative link between possessing the weapon and the injury. Instead, plaintiff asserts that Evans carelessly handled the gun. But the only evidence on this issue is comprised of the facts that Evans said the gun was "a piece of shit," which is an ambiguous phrase at best,[2] that Evans brought the gun to the kitchen where another person was before ascertaining if it was loaded, and that he then tried to release the clip by hitting the button or the bottom of the gun. Plaintiff does not assert that this is not the proper way to release the clip. There is no evidence that Evans ever touched the trigger or pointed the gun at Wooten. Thus, there is no evidence that Evans discharged the gun. Moreover, the police reports indicate there was a ricochet mark on the counter, leading to the inference that Evans was *not* pointing the gun at Wooten. The only thing Evans could have done to be more careful would be to check the gun's status without anyone around. Plaintiff does not identify and we find no cases where the conduct was criminal without any pointing of the gun at a person, waving it around, firing it indiscriminately, or carrying it in a fight. While perhaps a jury could disbelieve Evans and find he was careless, Evans's conduct does not amount to being careless as a matter of law, and the parties have agreed to view the question as one of law.

Plaintiff also argues that, because coverage should be excluded for Evans because his act was of a criminal nature, coverage is also excluded for the derivative claim against Ruth Evans. Plaintiff asserts that Wooten made no allegations concerning how Ruth Evans breached any duty owed him and that she had no duty to protect Wooten from her son's unforeseen criminal conduct. We disagree. Because we hold that the injury was not excluded from coverage, then all the insureds are covered. Ruth Evans has been sued due to injuries arising from an "occurrence" covered by her insurance policy. Plaintiff must defend her in the underlying suit, regardless of the lack of allegations against Ruth Evans in that complaint, until she is dismissed.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

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[2] Plaintiff asserts that this phrase meant Evans knew the gun was defective. But Evans never said that, and testified that he had fired the gun for practice "[m]aybe two" times before. Evans's words could have just as easily meant the gun was cheap or not especially good. An inference that Evans knew the gun was so defective it would discharge unexpectedly is mere speculation.